(3)

FILED
JUL 22 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DOW JONES & COMPANY, INC., THE *LOS ANGELES TIMES*, ABC, INC., THE ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., CBS BROADCASTING INC., FOX NEWS NETWORK, NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY, TIME INC., *USA TODAY*, AND *THE WASHINGTON POST*,

Petitioners,

v.

PRESIDENT WILLIAM JEFFERSON CLINTON, THE WHITE HOUSE, INDEPENDENT COUNSEL KENNETH W. STARR, MONICA LEWINSKY, AND FRANCIS D. CARTER,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THEODORE J. BOUTROUS, JR.
Counsel of Record
THOMAS G. HUNGAR
JONATHAN K. TYCKO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

DISCUSSION 1

I. The Circuits Are In Disagreement, As Amply Demonstrated By The White House's Opposition 2

II. Application Of The Proper First Amendment Standards By The District Court Would Have Had A Substantial Impact On The Public's Access To The District Court's Judicial Proceedings 4

III. Contrary To The White House's Assertion, The First Amendment Issue Is Squarely Presented 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982) 5

Press-Enterprise v. Superior Court,
464 U.S. 501 (1984)..... 5

Press-Enterprise Co. v. Superior Court,
478 U.S. 1 (1986) 5,7

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980)..... 7

Seattle Times Co. v. United States Dist. Court,
845 F.2d 1513 (9th Cir. 1988) 2

United States v. Simone, 14 F.3d 833
(3d Cir. 1994) 2

United States v. Suarez, 880 F.2d 626
(2d Cir. 1989) 2

Statutes And Other Authorities

Fed. R. Crim. P. 6(e) 6,8,9

United States District Court for the District
of Columbia Local Rule 302 8,9

Periodicals

Peter Baker, *Secret Service Motion Spurned*, Wash. Post, July 16, 1998 8

John M. Broder, *Court and Principals in Lewinsky Matter Meet in Secret*, N.Y. Times, Jul. 22, 1998..... 8

Petitioners Dow Jones & Company, Inc., the *Los Angeles Times*, ABC, Inc., The Associated Press, Cable News Network, Inc., CBS Broadcasting Inc., Fox News Network, National Broadcasting Company, Inc., The New York Times Company, Time Inc., *USA Today*, and *The Washington Post* respectfully submit this reply brief in support of their petition for a writ of certiorari, and in response to the Brief For Respondent The White House In Opposition (the "White House Opp.").

DISCUSSION

This case squarely presents the question whether closure of judicial hearings ancillary to grand jury proceedings, including hearings relating to the Independent Counsel's investigation of the President, violates the public's First Amendment rights. The proper resolution of this question is fundamental to the ability of the press to report to the public in a timely manner on matters of utmost concern during the midst of a national controversy over criminal allegations relating to the President. As the White House's opposition makes abundantly clear, deep division exists among the lower courts concerning the proper test for determining when the First Amendment presumption of access applies to particular judicial proceedings. The Court should grant the petition to resolve the conflict regarding this important and recurring issue, and to ensure that the public's rights of access are not unconstitutionally restricted in this case, where an Independent Counsel, acting on behalf of the United States, is deploying his extraordinary powers to investigate the Chief Executive of the United States.

I. The Circuits Are In Disagreement, As Amply Demonstrated By The White House's Opposition

The White House argues that the circuit courts are not in disagreement concerning whether the "experience" factor is an absolute prerequisite. White House Opp. at 8-10. But the White House's analysis of the relevant Second, Third and Ninth Circuit cases is essentially identical to the analysis of those cases presented in the Petition, and amply demonstrates that a disagreement *does* exist.

The White House argues that *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989), *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994), and *Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988), are not inconsistent with the ruling below of the D.C. Circuit, but instead are "distinguishable" on grounds that "they involved novel types of judicial proceedings for which no history relevant to the 'experience' test existed." White House Opp. at 8-9. But the White House concedes that in all three of those cases, the courts of appeals found a First Amendment right of access, even though there was "no relevant evidence of 'experience.'" *Id.* at 10. Thus, the White House *agrees* with Petitioners' basic point: that the Second, Third and Ninth Circuits do not interpret the "experience" factor as a necessary prerequisite to finding that the First Amendment presumption applies to a particular type of judicial proceeding.

And the White House also agrees, as it must, that it was a perceived lack of sufficient evidence of "experience" that led the D.C. Circuit to conclude that no First Amendment right of access applied to the ancillary hearings at issue. In describing the D.C. Circuit's ruling on the First Amendment issue, the White House

states that "[t]he court of appeals found 'too few examples of open ancillary hearings . . . in the grand jury context' to support a colorable First Amendment claim." White House Opp. at 5. Assuming *arguendo* that the D.C. Circuit was correct about the lack of evidence of open ancillary hearings, that lack of evidence simply would have placed the ancillary hearings into the category described by the White House as "novel types of judicial proceedings for which no history relevant to the 'experience' test existed." *Id.* at 8-9. Thus, had the D.C. Circuit applied the analysis of the Second, Third and Ninth Circuits (even as described by the White House), it would then have gone on to analyze the "logic" factor. Analysis of the "logic" factor would heavily have favored recognition of a First Amendment qualified right of access, as acknowledged by the D.C. Circuit. *See* Pet. App. 16a.

Accordingly, the White House's analysis of the decision below, and of the relevant Second, Third and Ninth Circuit decisions, is entirely consistent with the analysis presented in the Petition. It amply demonstrates the existing disagreement among the courts of appeals concerning whether satisfaction of the "experience" factor is a necessary prerequisite to recognition of a First Amendment right of access.

The White House does not disagree that the D.C. Circuit's interpretation of the "experience" factor as requiring an "'unbroken, uncontradicted history'" of public access, Pet. App. 16a, is inconsistent with decisions of this Court and of other courts of appeals. *See* Pet. at 18-20. Nor does the White House disagree that there in fact exists a strong history, dating back at least to the 1807 Aaron Burr proceedings, of open judicial hearings on matters ancillary to ongoing grand jury investigations. *See id.* at 22-29. And neither the White House

nor the court below was able to demonstrate a history of *closure* of such judicial proceedings.

In short, the D.C. Circuit's ruling below is inconsistent with the decisions of other courts both with respect to whether satisfaction of the "experience" factor is a necessary prerequisite to recognition of a First Amendment presumption of access, and with respect to the type or quantum of historical evidence necessary to satisfy that factor. Clarification by this Court of the meaning and application of the "experience" factor is necessary to resolve these disagreements among the lower courts, and to provide for consistent and proper adjudications of the public's rights of access to judicial proceedings in the future.

II. Application Of The Proper First Amendment Standards By The District Court Would Have Had A Substantial Impact On The Public's Access To The District Court's Judicial Proceedings

The White House suggests that the issue presented by the Petition is not significant because "at no time have Petitioners been completely deprived of information about the proceedings below." White House Opp. at 5. That suggestion, however, is simply incorrect. On March 20, 1998, the district court held its hearing on the President's assertions of executive and attorney-client privilege. That hearing was held behind closed doors, without any advance public notice, and without any public explanation for the closure. More than two months then passed before the district court, on May 26, finally unsealed a redacted version of the transcript of that hearing. Thus, the public was indeed "completely deprived" of information concerning that hearing—and the arguments being made by both the President and the

Independent Counsel concerning matters of great public interest—for an extended period of time.

Had the district court properly concluded that the First Amendment presumption of access applied to the March 20 hearing, the result would necessarily have been far different. The district court would have been required to give advance public notice of its intention to hold a closed hearing, and members of the public and press would have been entitled to an opportunity to be heard on the question of their exclusion. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982). Moreover, the hearing could not have been closed, even in part, unless the district court first made "specific, on the record findings" that "'closure [was] essential to preserve higher values and [was] narrowly tailored to serve that interest'"—findings that have *never* been made in this case. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*") (quoting *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*")).

Had the district court correctly complied with First Amendment dictates, the March 20 hearing would have been open to the public, at least in part. Significant portions of the March 20 hearing—in particular, those portions in which the President and Independent Counsel discussed their legal positions on the questions of executive and attorney-client privilege—could have been open to the public, without disclosing secret grand jury materials. The redacted transcript of the March 20 hearing, which Petitioners have lodged with the Court, demonstrates that long stretches of that hearing involved solely legal argument, without any revelation of secret grand jury materials. And as the White House points out, *see* White House Opp. at 5, the June 29, 1998 oral

argument on the appeal of the district court's governmental attorney-client privilege ruling—which was heard by the same panel of the court of appeals that heard the instant case—was bifurcated precisely along those lines, amply demonstrating the feasibility of holding such a bifurcated judicial proceeding. Thus, notwithstanding the court of appeals' statement below that such a procedure would be "ridiculous," Pet. App. 12a, that court's own actions show that the March 20 hearing could have been structured so that the historic legal arguments of the President and the Independent Counsel were presented in an open courtroom, with secret grand jury materials discussed during bench conferences or during a separate, closed portion of the hearing.[1]

The district court's finding that "it would be too disruptive to stop the hearing and clear the courtroom every time that Rule 6(e) material is to be mentioned," Pet. App. 41a-42a, falls far short of the type of finding required to justify closure under the First Amendment.[2]

---

[1] That an open hearing could be conducted without revelation of secret grand jury materials was persuasively demonstrated by the fact that the Independent Counsel—the only party before the district court that had access to secret grand jury materials and was bound by Rule 6(e)—moved the district court to open the March 20 hearing. *See* Pet. App. 41a.

[2] The White House contends that the district court found that "discussions of the legal issues could not readily be separated from discussions of sealed grand jury material." White House Opp. at 3. But the district court made no such finding. If anything, the implication of the district court's statement at the start of the March 20 hearing was that the "legal issues" *could* be separated from the "sealed grand jury materials," but that, in the district court's view, the mechanics of doing so would be "disruptive."

The First Amendment requires that closure orders be "narrowly tailored" to serve "higher values." *Press-Enterprise II*, 478 U.S. at 13-14. Obviously, closed-door hearings will always be less "disruptive" than hearings that involve bench conferences or that are bifurcated. Thus, the mere avoidance of "disruption" cannot be a "higher value" sufficient to trump the public's right of access, or that right would be far too easily undermined. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (Burger, C.J.) (alternatives to complete closure of criminal trials "admittedly present difficulties for trial courts" but are not "beyond the realm of the manageable"; therefore, such difficulties do not justify complete closure). The district court's desire to avoid "disruption" plainly is not a sufficient basis for complete closure of the March 20 hearing under First Amendment standards.

Accordingly, application of the First Amendment presumption clearly would have dictated that the March 20 hearing be opened to the public, at least in substantial part. Yet, Petitioners and the public were instead prohibited from witnessing any portion of that historic hearing, and were completely deprived of any information about the legal positions taken by the President and the Independent Counsel regarding these vital issues for more than two months while the national controversy raged on.

The White House's opposition does not address the other hearings from which Petitioners were excluded. But, lest there be any doubt about the impact of the lower courts' rulings, it is noteworthy that, as of the filing of this reply brief, the district court *still* has not unsealed *any* transcripts of the March 4, 1998 hearing on Francis D. Carter's attorney-client privilege objections, or the March 12, 1998 hearing on the President's show-

cause motion. Thus, Petitioners and the public have been deprived of access to the contents of those hearings for more than four months.

Moreover, the ruling of the court of appeals has had a continuing detrimental impact on public access to judicial hearings relating to Mr. Starr's investigation. Even since the filing of this Petition, the district court and circuit court have continued to hold unannounced, unexplained closed-door judicial hearings relating to the investigation. *See, e.g.*, Peter Baker, *Secret Service Motion Spurned*, Wash. Post, July 16, 1998, at A1 (reporting that the district court held a closed-door hearing on July 15 regarding the Justice Department's motion to stay enforcement of subpoenas to Secret Service agents); John M. Broder, *Court and Principals in Lewinsky Matter Meet in Secret*, N.Y. Times, Jul. 22, 1998 at A16 (reporting on D.C. Circuit's July 21 closed-door hearing, reportedly relating to an appeal from the district court of a ruling relating to alleged "leaks" by the Office of Independent Counsel).

III. Contrary To The White House's Assertion, The First Amendment Issue Is Squarely Presented

The White House argues, albeit in highly ambiguous terms, that it is "far from clear" that the First Amendment issues are "squarely presented," suggesting that Local Rule 302 and Fed. R. Crim. P. 6(e) "appear" to "resolve this dispute conclusively against Petitioners." White House Opp. at 13. That argument is entirely meritless. There is no doubt that the First Amendment argument was squarely presented to, and squarely rejected by, the court of appeals, and that resolution of the First Amendment argument in Petitioners' favor would change the result reached below. Neither Local Rule 302 nor Federal Rule 6(e) could "conclusively" resolve

the question against Petitioners if the First Amendment—which obviously trumps such rules—provides a right of access.

In any case, nothing in either Local Rule 302 or Federal Rule 6(e), as interpreted below, forbids a district court from permitting public access to portions of judicial proceedings that do not reveal secret grand jury materials.[3] Accordingly, those rules are not the least bit inconsistent with recognition of a First Amendment presumption of access.

The White House also incorrectly suggests that "the Petition does not challenge the shared conclusion of both courts below . . . that public attendance at the hearings would be disruptive." White House Opp. at 14. The district court reached that "conclusion" solely with respect to its March 20, 1998 hearing, and the Petition specifically argues that the March 20 hearing "could easily have been open to the public without causing any serious disruption, and no compelling interest warranted closure of the hearing." Pet. at 29. Thus, the Petition quite obviously *does* challenge the district court's "disruption" finding, as well as the notion that

---

[3] Local Rule 302, read literally, suggests that all ancillary hearings conducted in the United States District Court for the District of Columbia must be closed to the public. But the court of appeals correctly interpreted that rule "to mean only that, as an initial matter, all proceedings relating to the grand jury shall be closed, subject to an order opening the proceedings." Pet. App. 10a. Thus, Local Rule 302, as interpreted below, would not forbid the district court from opening ancillary hearings to the public upon a finding that doing so is required by some other authority, such as the First Amendment. Based upon that interpretation of Local Rule 302, Petitioners would have no basis for challenging that rule as inconsistent with the First Amendment.

such a finding was sufficient to justify complete closure of the March 20 hearing.

CONCLUSION

The Court should use this opportunity to resolve important issues concerning the public's First Amendment rights of access to judicial proceedings, including proceedings involving matters of overwhelming public interest and significance such as those at issue in this case. The petition for a writ of certiorari should be granted.

Respectfully submitted.

July 22, 1998

THEODORE J. BOUTROUS, JR.
Counsel of Record
THOMAS G. HUNGAR
JONATHAN K. TYCKO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

Of Counsel:

Stuart D. Karle
Dow Jones & Company
200 Liberty Street
New York, NY 10281

Henry S. Hoberman
Stephanie S. Abrutyn
ABC, Inc.
77 W. 66th Street
New York, NY 10023

David C. Kohler
Jennifer Falk Weiss
Cable News Network, Inc.
One CNN Center
Box 105366
Atlanta, GA 30348-5366

Dianne Brandi
Fox News Network
1211 Avenue of the Americas
New York, NY 10036

George Freeman
Adam Liptak
The New York Times Company
229 West 43rd Street
New York, NY 10036

Barbara W. Wall
USA Today
1100 Wilson Boulevard
Arlington, VA 22234

Karlene W. Goller
Los Angeles Times
145 S. Spring Street
Los Angeles, CA 90053

Richard N. Winfield
David A. Schulz
Rogers & Wells
200 Park Avenue
New York, NY 10166
Counsel for The Associated Press

Susanna M. Lowy
CBS Broadcasting Inc.
51 W. 52nd Street
New York, NY 10019

Alisa D. Shudofsky
Roberta Brackman
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, NY 10112

Robin Bierstedt
Time Inc.
Time & Life Building
Rockefeller Center
New York, NY 10020-1393

Mary Ann Werner
Katharine Weymouth
Karen Kramer
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071